No. 83-347

IN THE

Supreme Court of the United States

October Term, 1982

A.L. LOCKHART, Director, Arkansas Department of Correction,

Petitioner,

v.

JIMMY LEE DYAS,

Respondent.

ON PETITION FOR A
WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

For the petitioner:

Whether the court of appeals erred in remanding the habeas petition for a hearing because respnodent allegedly did not allege actual bias in his habeas petition.

For the respondent in defense of the judgment:

Whether judicial bias can be presumed sufficient to support a denial of due process from the fact the trial judge at respondent's state murder trial was the father, brother, and uncle of the prosecutors.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTIONAL AMENDMENTS:

RULES:

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STATEMENT OF THE CASE

1. Introductory Statement

The petitioner's argument here is based on a disagreement over whether respondent made a

claim of actual bias in respondent's habeas corpus petition in the U.S. District Court for the Eastern District of Arkansas.

In his petition, respondent alleged that the trial judge was biased and this denied him due process of law. In his briefs in the federal courts, this issue was argued as one of presumed bias because of family relation and, alternatively, as one of actual bias. The court of appeals rejected the first argument but held that respondent was at least entitled to a hearing on the claim of actual bias. Dyas v. Lockhart, 705 F.2d 993 (8th Cir.1983).

In this Court, petitioner claims that the respondent did not allege actual bias. Respondent submits that this is not a correct assumption of what respondent argued in the courts below.

In addition, respondent submits that if this court decides to grant the petition for a writ of certiorari, the Court should also review whether the court of appeals erred in holding that the trial judge's close family relationship with the three members of the prosecution team in violation of Canon 3C(1)(d)(ii) of the Code of Judicial Conduct, adopted in Arkansas at the time of respondent's trial, does not constitute a denial

of due process of law.

2. Procedural History and Issues Raised

This is a habeas corpus case challenging the respondent's 1975 Little River County, Arkansas capital felony murder conviction and sentence of life imprisonment without parole in the 1975 murder of Curtis Eugene Zachry. Three people were convicted in the killing including respondent and Zachry's wife.

Petitioner handled his state appeal pro se and in forma pauperis, and he filed a 200+ page abstract and brief in the Arkansas Supreme Court. Respondent raised many potential grounds for reversal including the one at issue here. He contended the trial judge was biased against him because the trial judge, Bobby Steel (now deceased), was closely related to every member of the prosecution team: Prosecuting Attorney George B. Steel, Jr., was Judge Steel's nephew; Deputy Prosecuting Attorney Jetty Steel was Judge Steel's brother; Deputy Prosecuting Attorney Jim Bob Steel was Judge Steel's son. In addition, the official court reporter was Daisy Steel, the judge's wife, and the son of respondent's lead defense counsel,

Boyd Tackett, was engaged to marry one of the prosecutors right after the trial. The record is not yet complete on this latter question. It developed that Judge Steel offered to recuse in a letter to Mr. Tackett, and Mr. Tackett waived recusal for respondent without informing him of the offer as required by Canon 3D of the Code of Judicial Conduct.

The Arkansas Supreme Court affirmed respondent's conviction in a lengthy opinion, Dyas v. State, 260 Ark. 303, 539 S.W.2d 251 (1976), holding on the bias issue that respondent made no objection at trial, so it was raised for the first time on appeal, and, alternatively, that the record was incomplete on that issue; id. at 323, 539 S.W.2d at 263:

> Not only did appellant fail to object to Judge Steel's hearing of the case or request that he disqualify himself, but his brief reveals that his attorneys declined to accept Judge Steel's offer to disqualify himself prior to the trial. Appellant argues only that his attorneys should have consulted him before assenting to Judge Steel's continued handling of the case. The actual record is deficient on this point and appellant's complaint is too late and cannot be raised for the first time on appeal. We note that the identical surnames of the judge and the prosecuting attorney were obviously known.

Respondent raised this issue again in his petition to the Arkansas Supreme Court for permission to seek post-conviction relief in the Little River Circuit Court. That court granted permission to seek post-conviction relief, but not on this issue. The Circuit Court denied relief, and the Arkansas Supreme Court affirmed in an unpublished opinion.

Respondent then filed his federal habeas corpus petition pro se and in forma pauperis alleging numerous grounds for relief including this one. His family retained counsel, and the petition was redrawn with the original petitions attached and incorporated. The question of judicial bias was raised in ¶ 12 in counsel's typewritten petition and, specifically, grounds 38, 41, 42, and 45 and passim in the attached pro se petition.

The U.S. District Court denied relief without a hearing in an unpublished opinion (at 3):

> As for the due process argument under the Constitution of the United States, petitioner has not alleged in his petition or his response to the motion to dismiss any specific prejudice or any evidence of unfairness in the trial. Nor does the Court find that prejudice may automatically be presumed in this situation. In addition, it would be

difficult to find for the petitioner in any event inasmuch as the judge offered to recuse and petitioner's counsel declined to accept the offer.

On appeal to the Eighth Circuit Court of Appeals, respondent argued the judicial bias question as one of presumed bias and alternatively as actual bias. The court of appeals reversed. Dyas v. Lockhart, 705 F.2d 993 (8th Cir. 1983).

The court of appeals first held that there was no constitutional due process violation under respondent's argument of presumed judicial bias from the judge's and prosecutor's close family ties. The court of appeals distinguished this factual situation from those where the trial judge had a pecuniary interest in the outcome or had been the target of personal abuse by the litigants. Id. at 996-997. The court of appeals held, however, that respondent should have been permitted to have a hearing on the claim of actual bias, and it reversed and remanded for that purpose. Id. at 997.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The record does not support the petitioner's Question Presented For Review.

The petitioner's Question Presented for Review is premised on the petitioner's contention that the respondent did not allege actual judicial bias in his petition. To the contrary, respondent did allege actual bias in his original handwritten pro se petition for a writ of habeas corpus. When counsel got in the case, effective advocacy dictated that the claim be pursued as a claim of (1) presumed judicial bias as a denial of Fourteenth Amendment due process from the close family relationship of the trial judge and the prosecutors, and (2), alternatively, a claim of actual judicial bias of the trial judge on which respondent has continually been denied a hearing in any court on post-conviction or habeas review.

The district court denied relief without a hearing finding no presumed bias from the relationship and no actual bias because the claim was

not raised at trial and because respondent's counsel waived the judge's recusal for him (whether or not respondent was informed of the recusal offer was treated by the district court as legally irrelevant). Respondent has alleged throughout these proceedings that he was not informed of the trial judge's recusal offer to his counsel and that the trial judge was actually biased.

The court of appeals held with the petitioner on the presumed bias argument but reversed and directed a hearing on the waiver of the judge's recusal contention underlying the actual bias argument. The court of appeals did hold that the trial judge's family relationship with the prosecutors could be considered along with his overall conduct of the trial as bearing on whether actual bias existed. Respondent has not succeeded in having the writ granted -- he has only been able to have a hearing on his claim of actual bias.

In this regard, the court of appeals was simply following the requirements of Townsend v. Sain, 372 U.S. 293, 312-313 (1963):

> Where the facts are in dispute, the federal court must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state court trier of fact has after a full hearing reliably found the relevant facts. (footnote omitted)

Here, the facts are in serious dispute on the actual bias claim and the underlying waiver of the recusal offer, and respondent has yet to have a hearing in any court on the actual bias claim even though he has been raising it for more than seven years.

The lack of any hearing on the habeas claim thus distinguishes this case from Smith v. Phillips, 455 U.S. 209 (1982), where the Court rejected a presumption of juror bias where the state hearing judge found beyond a reasonable doubt that the misconduct of the prosecutors and juror did not affect the verdict. Also, the state trial judge's failure to follow Canon 3D of the Code of Judicial Conduct and Arkansas law and get a personal waiver from respondent when the judge offered to recuse to defense counsel, as alleged in the habeas petition, and the failure of

any tribunal to grant a hearing on this issue distinguishes this case from Cuyler v. Sullivan, 446 U.S. 335 (1980).

Thus, the court of appeals has not decided this case contrary to the decisions of this Court nor has it "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision," S.Ct.Rule 17.1(a). Furthermore, this issue is not an important question of federal habeas corpus law in light of the factual contentions. S.Ct.Rule 17.1(c)

2. If the Court does grant review, it should decide the whole case including the issue decided against respondent below; i.e., whether judicial bias can be presumed sufficient to support a denial of due process from the fact the trial judge at respondent's state murder trial was the father, brother, and uncle of the prosecutors.

Respondent has not filed a cross-petition for certiorari. Nevertheless, if the Court grants the petition for a writ of certiorari, it should, in

its discretion, grant review of the question respondent lost below involving the state trial judge's presumed judicial bias because he was the father, brother, and uncle of respondent's prosecutors at the murder trial. See United States v. New York Telephone Co., 434 U.S. 159, 166 n. 8 (1977) (Court has discretion to consider a ground not raised in the petition but raised by respondent "because the prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted.").

A.

In re Murchison, 349 U.S. 133, 136 (1955), the Court held:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness . . . Circumstances and relationships must be considered. This Court has said, however, that "Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused, denies the latter due process of law." Tumey v. Ohio,

> 273 U.S. 510, 532. [To] perform its high function in the best way "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14. (emphasis added)

See also Johnson v. Mississippi, 403 U.S. 212, 216 (1971) ("Trial before 'an unbiased judge' is essential to due process."); Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971); Bloom v. Illinois, 391 U.S. 194, 205 (1968).

The Third Circuit stated in Rapp v. Van Dusen, 350 F.2d 806, 812 (3d Cir. 1965): "For the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality." Rapp was followed in United States v. Brown, 539 F.2d 467, 469 (5th Cir. 1976).

Many cases have held that the right to an impartial trial judge is a due process right. See, e.g., United States v. Scuito, 531 F.2d 842, 845 (7th Cir. 1976) ("The right to a tribunal free from bias or prejudice is based, not on [statute], but on the Due Process Clause."); United States v. Kames, 531 F.2d 214 (4th Cir. 1976); United States v. Meyer, 149 U.S. App. D.C. 212, 462 F.2d 827, 836 (1972); Cross v. Georgia, 581 F.2d 102, 104 (5th Cir. 1978);

United States v. Gower, 447 F.2d 187, 191 (5th Cir. 1971), cert. den. 404 U.S. 850; United States ex rel. Bloeth v. Denno, 313 F.2d 364 (2d Cir. 1963), cert. den. 372 U.S. 978; United States v. Conforte, 457 F.Supp. 641, 659 n.1 (D.Nev. 1978) (due process right separate from recusal); United States v. Boffa, 513 F.Supp. 505, 508 (D.Del. 1981) (same); Sheppard v. Maxwell, 231 F.Supp. 37, 65 (S.D.Ohio 1964), rev'd on other grounds 346 F.2d 707 (6th Cir.), rev'd 384 U.S. 333 (1966).

B.

The Code of Judicial Conduct was the law of Arkansas at the time of respondent's trial. Canon 3C(1)(d)(ii) mandated the trial judge's disqualification where he was related to attorneys for the parties unless there was a personal waiver by the litigant under Canon 3D. Adams v. State, 269 Ark. 548, 601 S.W.2d 881 (1980); Edmondson v. Farris, 263 Ark. 505, 565 S.W.2d 617 (1978). See Byler v. State, 210 Ark. 790, 197 S.W.2d 748 (1946).

The Arkansas court refused to reverse respondent's conviction because of this problem,

but it did reverse the conviction in 1980 in Adams in the absence of a personal waiver on substantially similar facts. Adams also involved Judge Steel and family, except that the judge had since died.

C.

The issue respondent has presented is a significant issue which has not yet been specifically decided by this Court.

In Smith v. Phillips, supra, the Court held that there was no presumption of juror bias sufficient to make a denial of due process for habeas corpus relief. There, however, the fact finder found beyond a reasonable doubt that the verdict was not affected by the alleged juror misconduct. In Cuyler v. Sullivan, supra, at 349-350, the Court held that it would not presume a Sixth Amendment denial of effective assistance of counsel where multiple trial counsel allegedly represented conflicting interests but where the habeas petitioner had not "show[n] that his counsel actively represented conflicting interests."

The claim here, however, is substantially

more fundamental and a presumption of judicial bias for the appearance of impropriety should be held to state a due process claim. The courts have long recognized that the "appearance of justice" is just as important as the "reality of justice." Respondent submits that In re Murchison, quoted supra, as applied to these facts requires a finding that the inherent judicial bias recognized in Canon 3C(1)(d)(ii) rises to the level of a due process violation where there is no waiver under Canon 3D and without the necessity of a showing of actual bias. This question should be reviewed by this Court. S.Ct. Rule 17.1(c).

CONCLUSION

For the reasons stated in part 1, the petition for a writ of certiorari should be denied.

If, however, the Court grants certiorari on that issue, it should also grant review of the issue discussed in part 2.

Respectfully submitted,

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